

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

ROBERT ORCHARD,	)	
	)	
	)	
v.	)	Criminal No. 02-37-B-S
	)	
	)	Civil No. 04-34-B-S
UNITED STATES OF AMERICA,	)	
	)	
	)	

**RECOMMEND DECISION ON 28 U.S.C. § 2255 MOTION**

On September 24, 2002, Robert Orchard pled to five counts of an eight count indictment against him, admitting his guilt of being a felon in possession of a firearm, conspiring to distribute, as well as possession of, 500 grams or more of cocaine and 100 grams or more of heroin, and the use of a firearm in furtherance of a crime of violence. Having taken no direct appeal, Orchard has filed a 28 U.S.C. § 2255 motion (Docket No. 1) identifying three grounds for relief, and, it seems, envisioning a fourth ground. For the reasons below, I now recommend that the Court **DENY** the § 2255 motion in its entirety.

***Discussion***

To succeed with his ineffective assistance claims Orchard must demonstrate, one, that counsel's performance fell below an objective standard of reasonableness, and, two, that, but for the error or errors, the outcome of his case would likely have been different, Strickland v. Washington, 466 U.S.668, 687 (1984). See also Cofske v. United States, 290 F.3d 437, 441 (1st Cir. 2002) (applying Strickland in the context of ineffective assistance claim vis-à-vis sentencing determinations).

Orchard's skeletal ineffective assistance claims cry out for summary dismissal.

His is a motion that comes nowhere near meeting the minimum pleading burdens of a

§ 2255 movant. In United States v. McGill the First Circuit stated:

When a petition is brought under section 2255, the petitioner bears the burden of establishing the need for an evidentiary hearing. See Mack v. United States, 635 F.2d 20, 26-27 (1st Cir.1980); United States v. DiCarlo, 575 F.2d 952, 954 (1st Cir.), cert. denied, 439 U.S. 834 (1978). In determining whether the petitioner has carried the devoir of persuasion in this respect, the court must take many of petitioner's factual averments as true, but the court need not give weight to conclusory allegations, self-interested characterizations, discredited inventions, or opprobrious epithets. See Mack, 635 F.2d at 27; Otero-Rivera v. United States, 494 F.2d 900, 902 (1st Cir.1974). Moreover, when, as in this case, a petition for federal habeas relief is presented to the judge who presided at the petitioner's trial, the judge is at liberty to employ the knowledge gleaned during previous proceedings and make findings based thereon without convening an additional hearing. See DiCarlo, 575 F.2d at 954-55.

We have distilled these principles into a rule that holds a hearing to be unnecessary "when a § 2255 motion (1) is inadequate on its face, or (2) although facially adequate is conclusively refuted as to the alleged facts by the files and records of the case." Moran v. Hogan, 494 F.2d 1220, 1222 (1st Cir.1974). In other words, a "§ 2255 motion may be denied without a hearing as to those allegations which, if accepted as true, entitle the movant to no relief, or which need not be accepted as true because they state conclusions instead of facts, contradict the record, or are 'inherently incredible.'" Shraiar v. United States, 736 F.2d 817, 818 (1st Cir.1984) (citations omitted); see also Rule 4(b), Rules Governing Section 2255 Proceedings.

11 F.3d 223, 225-26 (1st Cir. 1993).

### ***Ground One***

In his first ground Orchard states that his attorney was ineffective because he failed to raise and preserve for direct review a claim that two of Orchard's prior convictions underlying his Armed Career Criminal (ACC) status did not meet the definitional requirements of United States Sentencing Guideline § 4B1.2. The superseding indictment lists four Maine criminal convictions, three of which were the

predicate prior convictions: Terrorizing with a dangerous weapon, burglary, and unlawful sexual contact. (Criminal No. 02-37-B-S, Docket No. 14; Presentence Investigation Report at 8.) Orchard gives absolutely no indication which two of these convictions he believes his attorney should have challenged and on what ground. I agree with the United States that this claim should be summarily dismissed; although the Court can identify the statutory rubric applicable to such a challenge, see, e.g., 18 U.S.C. §§ 922(g), 924(e); U.S.S.G. §§ 4A1.2, 4B1.4 & cmt. n.1, this Court is not in the business of musing over how counsel might have challenged the use of two of these convictions, let alone speculating on what the factual predicate for such a challenge might be, see Pliler v. Ford, \_\_\_ U.S. \_\_\_, 2004 WL 1373174, \*4 (June 21, 2004) (concluding that district judges have no obligation to act as counsel or paralegal to pro se litigants, noting that being too proactive on the pro se litigant's behalf can undermine a district judge's role as an impartial decisionmaker).<sup>1</sup>

### ***Ground Two***

Orchard's second ground asserts that his attorney was ineffective because he failed to object to the leadership enhancement applied pursuant to United States Sentencing Guideline § 3B1.1(a). In a separate letter memorandum Orchard has provided an unsworn factual explanation (augmented by a chart) explaining why he should not have been subjected to this enhancement and representing that he attempted to get counsel to argue against its application. What ever the theoretical merit of such a challenge might have been (the United States argues that there is none) the enhancement had no practical effect.

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<sup>1</sup> The United States offers a convincing alternative basis for rejecting this ground, setting forth how, in its view, the claim fails on its merits. (Gov't Response § 2255 Mot. at 17-20.)

This is because of Orchard's status as an Armed Career Criminal. To start, Orchard's base offense level was 28 and the Court concluded that it should be increased by four levels because of his role as a leader and organizer of activity involving five or more participants. (Sentencing Tr. at 5.) This produced a total offense level of 32. (Id.) However, as Orchard was an Armed Career Criminal his offense level became 34, irrespective of his lower total offense level. (Id.) After a reduction for acceptance of responsibility from his ACC offense level his total offense level settled at 31 (Id.) With a criminal history category VI, his guideline term was imprisonment for 188 to 235 months. (Id.) The Court expressly stated that it could identify no basis for departure other than the United States Sentencing Guideline §5K1.1 motion. (Id. at 6.) The Court did, though, grant the United States' motion for downward departure, sentencing Orchard to 126 months on the grouped counts of two through five, and 60 months on the seventh § 924(c)(1) count, generating a total sentence of 186 months.

As the background note for United States Sentencing Guideline § 4B1.4 states:

This section implements 18 U.S.C. § 924(e), which requires a minimum sentence of imprisonment of fifteen years for a defendant who violates 18 U.S.C. § 922(g) and has three previous convictions for a violent felony or a serious drug offense. If the offense level determined under this section is greater than the offense level otherwise applicable, the offense level determined under this section shall be applied.

U.S.S.G. § 4B1.4, cmt. background (emphasis added). There clearly is no Strickland prejudice lurking here in counsel's failure to argue against the leadership adjustment. As there was no prejudice in light of the ACC level 34 trump card, it cannot be said that counsel was deficient in not pressing the court to desist from applying the inoperative leadership adjustment.

### ***Ground Three***

Orchard's third ineffective assistance ground states only: "Counsel failed to appeal an abuse of discretion claim of the courts failure to depart on a viable ground." The Court would have to speculate wildly as to both its legal theory and factual predicate to even venture upon a discussion of this claim. See McGill, 11 F.3d at 225-26.

### ***Ground Four***

Orchard's final ground is a request for an extension of time so that he can trowel his sentencing transcripts for other issues to present to the Court. On February 20, 2004, Orchard had requested his sentencing transcripts from the Court and the Court denied that motion, clearly indicating that such a request was premature prior to the filing of the 28 U.S.C. § 2255 motion. (Criminal No. 02-37-B-S, Docket Nos. 51&52.) In this fourth ground of this March 17, 2004, section 2255 motion, Orchard sought a ninety-day extension to file a memorandum of law based on the sentencing transcripts that he had requested from the clerk's office. This request for an extension was treated as a motion and I denied the extension, indicating that, to the extent Orchard anticipated raising new issues after the United States had responded to the motion, it was denied. (Docket No. 3.) The sentencing transcript is before the Court as part of the criminal record and Orchard has filed, on April 20, 2004, a supplemental memorandum elaborating his second ground, as discussed above. In view of this history, I consider ground four to be a truly hollow horse.

### ***Conclusion***

For the reasons above I recommend that the Court summarily deny Orchard's 28 U.S.C. § 2255 motion.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

June 23, 2004.

/s/Margaret J. Kravchuk  
U.S. Magistrate Judge

ORCHARD v. UNITED STATES OF AMERICA

Assigned to: JUDGE GEORGE Z. SINGAL

Referred to: MAG. JUDGE MARGARET J.  
KRAVCHUK

Demand: \$

Lead Docket: None

Related Cases: None

Case in other court: None

Cause: 28:2255 Motion to Vacate / Correct Illegal  
Sentenc

Date Filed: 03/17/04

Jury Demand: None

Nature of Suit: 510 Prisoner:

Vacate Sentence

Jurisdiction: U.S. Government  
Defendant

**Plaintiff**

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represented by **ROBERT ORCHARD**

10655-036

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V.

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